Supreme Court, U.S.
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No. 86-1876

In the Supreme Court of the United States

October Term, 1986

PACECO, INC.,

Petitioner,

v.

WILLIAM SMITH and TOKIO MARINE AND FIRE INSURANCE COMPANY, LTD.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL,
DISTRICT TWO, DIVISION FIVE

BRIEF FOR RESPONDENT TOKIO MARINE AND FIRE INSURANCE COMPANY, LTD.

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QUESTIONS PRESENTED

1. Are a state's tort laws unconstitutional where the facts of the case and the underlying policy considerations establish that the plaintiff, as the victim of a manufacturer's defective product, should not bear the ultimate burden of the manufacturer's negligence, and where the people of the state have previously acted to effect the legal reforms to correct the alleged unconstitutional condition?

2. Does the intersection of the Longshoremen's and Harbor Workers' Compensation Act with a state's tort laws so as to leave a third party tortfeasor, who has been found 5% negligent, responsible for the full amount of the judgment without offset for the amount of the employer's compensation payments, frustrate Congressional intent, offend Fifth Amendment principles and magnify the unfairness of the state's tort laws where Congress, the United States Supreme Court, and the State Supreme Court have expressly held that the substantial Federal Rights granted by the Act should be applied uniformly throughout the states to insure that the employer recover the full amount of its compensation payments and that the third party's liability not be restricted by the proportion of its fault?

TABLE OF CONTENTS

Page

Table of Authorities Cited iv

Statutory Provisions Involved 1

Statement 3

Reasons For Denying The Petition 5

Conclusion 13

TABLE OF AUTHORITIES CITED

Cases **Page**

American Motorcycle Association v. Superior Court (1978) 20 Cal. 3d 578 5
Bloomer v. Liberty Mutual Insurance Company (1980) 445 U.S. 74 ..... 8, 11
Cella v. Partenreederei Ms Ravenna 529 F. 2d 15 (1st Cir. 1975) 8
Edmunds v. Compagnie Generale Transatlantique (1979) 443 U.S. 256 ..... 11, 12, 13
Elmore v. American (1969) 70 Cal. 2d 578 7
Garrett v. Moore McCormack (1942) 317 U.S. 238 10
Hayden v. Kerr-McGee 787 F. 2d 1000 (5th Cir. 1986) 11
Haynes v. Rederi A/S Alladdin 362 F. 2d 345 (5th Cir. 1966) 11
Intagliata v. Shipowners and Merchants Tow Boat Company (1945) 26 Cal. 2d 365 10
Price v. Shell (1970) 2 Cal. 3d 245 7
Russell v. Superior Court (1986) 185 Cal. App. 3d 810 9
Schreeful v. Okuly (1983) 143 Cal. App. 3d 818 ..... 10, 11
Societa Per Azioni v. City of Los Angeles (1982) 31 Cal. 3d 446 10
Vandemark v. Ford Motor Co. (1964) 61 Cal. 2d 256 7

Statutes

33 United States Code
§901 *et seq.* (Longshoremen and Harbor Workers' Compensation Act) 3, 7, 8, 10, 11, 12
California Code of Civil Procedure
§473 4

California Civil Code
§1431 *et seq.* (The Fair Responsibility Act of 1986 - Proposition 51) 1, 4, 5, 8, 9

Other Authorities

United States Constitution
Fifth Amendment..... 12
House Report No. 92-1441 10

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BRIEF FOR RESPONDENT TOKIO MARINE AND FIRE INSURANCE COMPANY, LTD.

STATUTORY PROVISIONS INVOLVED

The Fair Responsibility Act of 1986 (Proposition 51), California Civil Code Sections 1431, et seq., provides, in pertinent part:

> Section 1431: "An obligation imposed upon several persons, or a right created in favor of several persons, is presumed to be joint, and not several, except as provided in section 1431.2, and except in the special cases mentioned in the [1] title on the [2] interpre-

tations of [3] contracts. This presumption, in the case of a right, can be overcome only by express words to the contrary."

Section 1431.1: "The People of State of California find and declare as follows:

a) The legal doctrine of joint and several liability, also known as 'the deep pocket rule', has resulted in a system of inequity and injustice that has threatened the financial bankruptcy of local governments, other public agencies, private individuals and businesses and has resulted in higher prices for goods and services to the public and in higher taxes to the taxpayers.

b) Some governmental and private defendants are perceived to have substantial financial resources or insurance coverage and have thus been included in lawsuits even though there was little or no basis for finding them at fault. Under joint and several liability, if they are found to share even a fraction of the fault, they often are held financially liable for all the damage. The People—taxpayers and consumers alike—ultimately pay for these lawsuits in the form of higher taxes, higher prices and higher insurance premiums.

c) Local governments have been forced to curtail some essential police, fire and other protections because of the soaring costs of lawsuits and insurance premiums.

Therefore, the People of the State of California declare that to remedy these inequities, defendants in tort actions shall be held

financially liable in closer proportion to their degree of fault. To treat them differently is unfair and inequitable.

The People of the State of California further declare that reforms in the liability laws in tort actions are necessary and proper to avoid catastrophic economic consequences for state and local governmental bodies as well as private individuals and businesses."

STATEMENT

William Smith, the plaintiff in the underlying action, was a longshoreman assigned to work for International Transportation Service (ITS) which operated a container storage facility under an arrangement with the City of Long Beach. On March 25, 1980, Mr. Smith was injured in the course of his employment at the storage facility while riding a crane called a "Transtainer". The Transtainer was manufactured by petitioner, Paceco, Inc. ITS made voluntary compensation payments to Mr. Smith pursuant to its obligations under the Longshoremen and Harbor Worker's Compensation Act, 33 U.S.C. section 901 et seq. (The "Act").

Mr. Smith filed an action in California Superior Court against various tortfeasors, including ITS and Paceco. The respondent, Tokio Marine and Fire Insurance Company, Ltd. (Tokio Marine), ITS's worker's compensation carrier, filed a Complaint-in-Intervention against Paceco and other defendants and subsequently filed a Notice of Lien for medical expenses and indemnity benefits paid under the Act.

Judgment upon special verdict was returned in favor of the plaintiff for $705,143.00. Negligence was apportioned 25% to plaintiff, 70% to ITS and 5% to

petitioner for the negligent manufacture and design of the Transtainer. After deducting the requisite amount attributable to Mr. Smith's negligence, the court ordered petitioner to pay Mr. Smith $528,857.25. Shortly thereafter, petitioner filed a motion to correct error in judgment form pursuant to California Code of Civil Procedure section 473, arguing that California's comparative negligence rules required that the judgment be offset by the amount of worker's compensation paid to the plaintiff by ITS under the Act ($156,596.00). The court denied petitioner's motion, ruling that Federal and maritime case law prohibit application of California's comparative fault rules as well as any form of indemnity.

Paceco appealed to the Court of Appeal, Second District, Division Five, claiming, in part, that: (1) The damage award was excessive, and the Court erred when it failed to reduce the judgment by the amount of worker's compensation benefits paid to respondent, and (2) California's law of joint and several liability was unconstitutional because it denied petitioner substantive due process and equal protection of the law. At Paceco's request, the parties were permitted to submit supplemental briefs regarding the applicability of the Fair Responsibility Act of 1986 (Proposition 51), now California Civil Code Section 1431, et seq.

The Court of Appeal, in an unpublished opinion, entered on December 4, 1986, affirmed the judgment of the trial court, ruling, on the compensation offset issue, and in accord with respondent's arguments on appeal, that: (1) Section 905 of the Act was controlling; (2) Federal case law interpreted the language of the statute broadly; (3) California courts had acted to protect LHWCA employers from indemnification actions by non-vessel third parties, and (4) Where compensation

payments were made directly under the Act, California's comparative fault principals reducing an employer's compensation lien on its employees third party judgment are inapplicable.

The Court of Appeal also held, that, as to the constitutionality of California's rule of joint and several liability, they were bound by the doctrine of joint and several liability articulated by the California Supreme Court in *American Motorcycle Association v. Superior Court* (1978) 20 Cal. 3d 578, 590, and went on to observe that while the People of California had acted to modify this rule through the passage of Proposition 51, Proposition 51 did not work retroactively to effect the issue presented to them by this case.

Paceco's Petition for Review to the California Supreme Court was denied.

REASONS FOR DENYING THE PETITION

1. Plaintiff was a victim of petitioner's defective product. That he was also the victim of his own employer's concurring dependent negligence does not justify an overhaul of long established principals of the law to shift the risk of loss from the manufacturer of the product to the victim.

Throughout its brief, Paceco presents itself as a wholly innocent victim caught in a web of inequities. This is simply not the case.

Paceco knew that to protect the Transtainer as well as property, life and limb, a signalman would be necessary for the blind side of the Transtainer. Petitioner knew that the practice in the industry required a signalman to work with the Transtainer.

Paceco also knew that riding a ladder while the Transtainer traveled was dangerous and very unsafe, but did not warn ITS that its design would pose a hazard to a signalman and other workers who might be tempted to ride the ladder. Nor did its manual provide any instructions in the use of the blind side of the Transtainer to dispel or guard against the impression created by the proximity of the ladder to the emergency devices.

Thus, on theories of negligence as well as strict liability, the jury found that Petitioner's product had a design defect which was the proximate cause of plaintiff's injuries.

The remarks of the Court of Appeal, of which petitioner takes unwarranted advantage, was that Paceco's liability in light of the jury's allocation of 5% fault, "at first blush" tends to shock the conscience. Looking behind the percentage, however, the facts and circumstances of this particular case belie the grounds for review urged by petitioner: petitioner manufactured and designed a defective product and had an ongoing business relationship with plaintiff's employer, ITS. There were 8 Transtainers in the yard where plaintiff was injured and petitioner had personnel on the premises and even participated in training the operators of the Transtainers.

If ITS's negligence increased petitioner's own exposure for the injuries proximately caused by its defective product, Paceco could have bargained for contractual indemnity, or considered such contingency in the course of its business relationship with plaintiff's employer. In contrast, plaintiff was a defenseless user of the defective product.

Furthermore, the negligence of the employer derived from, and operated on petitioner's negligence. The design

defect was the primary cause on which the concurrent negligence of plaintiff's employer depended. The doctrine of strict liability for products liability which shifts the risk of economic loss from the victim of the defective product to the manufacturer of the defective product evolved for public policy reasons aimed at deterrence and compensation. Petitioner argues that the risk should be borne by the injured plaintiff, or through him, by society. The courts have heretofore determined that the risk borne by society should come through the manufacturer of the defective product, not through the victim of the defective product.

Moreover, under the facts of this case and the relationship of the litigants, the doctrine of joint and several liability is consistent with the policies promoted by the doctrine of strict liability imposed on manufacturers of defective products. It would be anomalous to disregard Paceco's role and responsibilities as a manufacturer, and in the guise of modifying the doctrine of joint and several liability to relieve the manufacturer of its strict liability which evolved in the first place for the protection of plaintiff and persons similarly situated. The doctrine of strict liability imposes liability regardless of fault. Abrogation of the joint and several liability rule in this case, wherein petitioner was found negligent as well as strictly liable for a defective product, would undermine and violate an important public policy well recognized by the California Supreme Courts: *Vandemark v. Ford Motor Co.* (1964) 61 Cal. 2d 256; *Elmore v. American* (1969) 70 Cal. 2d 578; *Price v. Shell* (1970) 2 Cal. 3d 245.

Congress, the Federal courts have explained, expressed similar underlying policy considerations in the 1972 amendments to the Act. As, for years, the scale

of compensation payments under the Act had been insufficient, the overriding purpose of the amendments, in eliminating the shipowner's cause of action against the stevedore, was to strictly limit the liability of the stevedore in order to husband its resources, and its carrier's resources, for payment of increased benefits to longshoremen. *Bloomer v. Liberty Mutual Insurance Company* (1980) 445 U.S. 74, 85; *Cella v. Partenreederei Ms Ravenna* 529 F. 2d 15 (1st Cir. 1975) Certiorari denied 96 S. Ct. 2175.

Thus it is clear that, under the facts of this case, the public policy served by the conjunction of the adoption of joint and several liability, strict liability and the policies promoted by the Act are consistent with the opinion of the Court of Appeal below.

2. That portion of petitioner's argument, which asks this court to review the constitutionality of California's rule of joint and several liability as it applies to concurrent tortfeasors, has been rendered moot by the passage of the Fair Responsibility Act of 1986 (Proposition 51).

At the June 3, 1986 primary election, the people of the state of California amended and adopted by initiative, California Civil Code section 1431 et seq. The Code now holds that because the doctrine of joint and several liability creates inequities and injustices which threaten the financial welfare of the state [California Civil Code section 1431.1(a)], and because some large government and private financial institutions are included in lawsuits where they may become responsible for all the damage where their liability is minimal [California Civil Code section 1431.1(b)], the people, in order to remedy this situation, declare that, "Defendants in tort actions shall be held financially liable

in closer proportion to their degree of fault," and that further reforms may be necessary to correct the economic consequences of the prior law. California Civil Code section 1431.1(c).

This, in essence, is precisely the rationale and result which petitioner has proffered in support of its request for review of California's rule of joint and several liability. They ask this court to carry out reforms which have already been accomplished by the state.

Paceco argued for application of Proposition 51 before the Court of Appeal but the Court, finding, under the First Appellate District's decision in *Russell v. Superior Court* (1986) 185 Cal. App. 3d 810, that Proposition 51 could not be applied retroactively to cases, such as the instant case, which accrue on or after the effective date of the statute, denied petitioner's request for application of the statute. (Pet. App. 16a-17a). Petitioner has not raised the issue of retroactivity in its Petition for Writ of Certiorari.

Nor did they inform this court of Proposition 51's existence. This convenient and, perhaps, inexcusable oversight, may be understood in light of the fact that the reforms which Proposition 51 effects, renders Paceco's request for review by this court of California's rule of joint and several liability moot.

3. This case involves the interface of state and Federal law in a setting where the litigant's substantial federal rights must be enforced. Both the United States and California Supreme Courts, in examining the relationship between substantive federal rights and state laws within the context of maritime proceedings, have held that state courts must preserve the substantial federal rights of litigants where, to alter them, would

contravene congressional intent and disrupt the proper harmony of those laws as a system to be applied uniformally throughout the country. *Garrett v. Moore McCormack* (1942) 317 U.S. 238, 239; *Intagliata v. Shipowners and Merchants Tow Boat Company* (1945) 26 Cal. 2d 365, 371-372; *Societa Per Azioni v. City of Los Angeles* (1982) 31 Cal. 3d 446, 445 n. 10. The intent of Congress to preserve a uniform application of the Act throughout the states is evidenced by the House report on the 1972 amendments to the Act:

> "[The] Committee does not intend that the negligence remedy authorized in the bill shall be applied differently in different ports depending on the law of the state in which the port may be located. The Committee intends that legal questions which may arise in actions brought under these provisions of the law shall be deteremined as a matter of federal law" and in accordance with the admiralty concept of comparative negligence. H.R. Rep. No. 92-1441 U.S. Code Cong. and Admin. News, page 4705.

Moreover, the California Court of Appeal has explained, where compensation payments are made directly under the Act, application of California's comparative fault principals, so as to reduce an employer's compensation lien on its employee's third party judgment, would abridge substantive rights granted under federal law even where the subject matter of the third party litigation was in a distinctly non-maritime setting. *Schreeful v. Okuly* (1983) 143 Cal. App. 3d 818, 824.

Furthermore, the courts have been equally explicit in holding that the substantial federal rights of the respondent as employer would be thwarted if it received

anything less than the full amount of its lien. *Bloomer v. Liberty Mutual Insurance Company, supra,* 445 U.S. 74, 81-82; *Edmunds v. Compagnie Generale Transatlantique* (1979) 443 U.S. 256, 271-273; *Haynes v. Rederi A/S Alladdin* 362 F. 2d 345, 350-351 (5th Cir. 1966); *Hayden v. Kerr-McGee* 787 F. 2d 1000 (5th Cir. 1986); *Schreeful v. Okuly, supra,* 143 Cal. App. 3d 818, 822.

Therefore, petitioner's claims that this case, whereby they must be compelled to pay the total amount of the judgment without credit for the amount of ITS's compensation payments, "compounds and magnifys the fundamental unfairness of state court law" (Pet. 17) and "illustrates the pernicious and indefensible result of the intersection of the LHWCA, a non-fault compensation scheme, with state tort law, a fault based compensation scheme," (Pet. 18) fail to take into account: (1) that California courts are bound to enforce the substantial federal rights extended to both plaintiff and respondent by the Act, and (2) these rights, by the express intent of Congress, cannot be adjusted to accommodate California's comparative fault scheme, if, to do so, would disturb the uniformity of the Act's application throughout the states.

4. The decision of the Court of Appeal below is consistent with the decision of this court in *Edmunds v. Compagnie Generale Transatlantique, supra,* and with Congressional intent.

In *Edmunds,* this court, reversing the Fourth Circuit Court of Appeal's interpretation of the 1972 amendments to the Act, found that (1) Congress did not intend to impose the proportionate fault rules so as to alter a shipowner's responsibility to pay all the damages not due to the longshoreman's negligence, and (2) Where

injury to a longshoreman was occasioned by the combined negligence of the shipowner, stevedore and injured longshoreman, liability of the shipowner was not restricted only to that proportion of total damages which matched its proportionate fault and thus the shipowner could be forced to pay all the damages not due to the longshoreman's own negligence.

Rather than acknowledge the dispositive effect of *Edmunds* upon the instant case, petitioner instead complains, without offering a single authority in support of their argument, that the effect of *Edmunds*, when taken in conjunction with California's laws of joint and several liability, frustrates Congressional intent and offends Fifth Amendment principals.

This Court made an extensive examination of the Congressional intent underlying the 1972 Amendments to the Act in *Edmunds*, finding that the Committee's reports on the Amendments repeatedly indicated a refusal to limit a shipowner's liability for negligence which, the Committee felt, "left the vessel in the same position as a land-based third party whose negligence injures an employee." 443 U.S. at 267.

Thus, this Court concluded,

> "Some inequity appears inevitable in the present statutory scheme, but we find nothing to indicate and should not presume that Congress intended to place the burden of the inequity on the longshoreman whom the Act seeks to protect. Further, the 1972 amendments make quite clear that 'the employer shall not be liable to the vessel for such damages *directly or indirectly.*' 33 U.S.C. section 905(b)." 443 U.S. at 271. (Emphasis supplied by the Court).

Therefore, the Court's decision, in Edmunds, particularly as it interprets the congressional intent underlying the 1972 amendments to the Act, is wholly consistent with the decision of the Court of Appeal below.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on June 22, 1987, I served the within *Brief for Respondent* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on June 22, 1987, at Los Angeles, California.

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